AK Koh Enterprise Sdn Bhd v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41-18 OF 1999-III(II)
MUHAMMAD KAMIL J
15 MARCH 2000

Criminal Procedure *— Prosecution — Right to conduct prosecution — Prosecution by prosecuting officer of medical department — Seizable offence — No authorization from Public Prosecutor — Whether sanction of Public Prosecutor mandatory — Whether authorization can be presumed by court — Whether proceedings valid*

This was an appeal against the decision of the learned magistrate who had allowed the prosecuting officer of the medical department to institute criminal proceedings against the appellant wihout the authorization of the Public Prosecutor as required under the law.

Held, allowing the appeal:

A prosecuting officer may, under a particular law, institute a criminal proceeding but he must be authorized by the Public Prosecutor. Such an authorization or sanction to prosecute is required for each offence, and must be tendered into court before the trial begins so as to confer jurisdiction on the court. In the present case, the offence committed by the appellant is a seizable offence, thus a sanction or authorization to prosecute the case from the Public Prosecutor is mandatory. As no authorization letter was produced or tendered in court when the trial of the appellant began, the practice of presuming that the authorization had been given to the prosecuting officer adopted by the learned magistrate was ultra vires the law. This is because without this authorization, the court lacks jurisdiction to hear the case and this defect cannot be cured (see pp 186B–E, 188D).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan majistret yang bijaksana yang telah membenarkan pegawai pendakwa daripada bahagian perubaan untuk memulakan prosiding jenayah terhadap perayu tanpa kebenaran Pendakwa Raya sebagai mana yang dikehendaki di bawah undang-undang.

Diputuskan, membenarkan rayuan tersebut:

Seorang pegawai pendakwa boleh, di bawah suatu undang-undang tertentu, memulakan satu prosiding jenayah tetapi beliau seharusnya diberi kebenaran oleh Pendakwa Raya. Kebenaran atau sanksi sedemikian untuk mendakwa adalah perlu untuk setiap kesalahan, dan seharusnya ditenderkan ke mahkamah sebelum perbicaraan bermula bagi memberikan bidang kuasa kepada mahkamah. Di dalam kes ini, kesalahan yang dilakukan oleh perayu adalah satu kesalahan boleh tangkap, oleh itu suatu sanksi atau kebenaran untuk mendakwa

kes tersebut daripada Pendakwa Raya adalah mandatori. Memandangkan tiada surat kebenaran dikemuka atau ditenderkan di mahkamah semasa perbicaraan perayu bermula, amalan untuk menganggap bahawa kebenaran telahpun diberikan kepada pegawai pendakwa yang diterima oleh majistret yang bijaksana adalah ultra vires undang-undang. Ini adalah kerana tanpa kebenaran ini, mahkamah kurang bidang kuasa untuk mendengar kes tersebut dan kecacatan ini tidak boleh dipulihkan (lihat ms 186B–E, 188D).]

Notes

For a case on right to conduct prosecution, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2277.

Cases referred to

Chong Tuck Loong v PP Perak Criminal Appeal No 73/1952 (unreported) (refd)
Hassan bin Isahak v PP [1948–49] MLJ Supp 179 (refd)
Lyn Hong Yap v PP [1956] MLJ 226 (refd)
Ng Chuan & Anor v Rex [1948] MLJ 185 (refd)
PP v Jamil Jilap & Ors [2000] 5 MLJ 311 (refd)
PP v Lee Ming & Anor [1998] 4 MLJ 113 (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)
Sjn Thomas a/l Manivello v Lt Kol Din Yati bin Dahlan & Ors [1998] 3 MLJ 329 (refd)

Legislation referred to

Evidence Act 1950 s 114(e)
Federal Constitution art 145(3)
Food Act 1983 s 13(l)(e)

KC Wong (*KC Wong & Associates*) for the appellant.
Suhaimi Ibrahim (Deputy Public Prosecutor) for the respondent.

Muhammad Kamil J: This is an appeal against the decision of the learned magistrate who had allowed the prosecuting officer, Mr Gilbert Khoo of the Medical Department to institute a criminal proceedings against the appellant without the authorization of the public prosecutor as required under the law.

The appellant was charged as follows:

PERTUDUHAN PERTAMA

Bahawa kamu pada 14 Mei 1998, kira-kira jam 0930 pagi di premis Chop Aik Seng, No 8, Sebuyau Bazaar, Bahagian Kota Samarahan, Sarawak telah menjual makanan iaitu tiga (3) bungkus buah asam merah, Cap Dragon Horse, dimana setelah dianalisa didapati mengandungi pemanis tanpa zat siklamat. Ini adalah bertentangan dengan Peraturan 133(3) dan dibaca bersama Rajah 1 Jadual 17 Peraturan-Peraturan Makanan 1985. Dengan ini kamu telah melakukan kesalahan di bawah s 13(1)(e) Akta Makanan 1983.

PERTUDUHAN KEDUA

Bahawa kamu pada 14 Mei 1998, kira-kira jam 0930 pagi di premis Chop Aik Seng, No 8, Sebuyau Bazaar, Bahagian Kota Samarahan, Sarawak telah menjual makanan iaitu (3) bungkus buah asam merah, Cap Dragon Horse, dimana label telah menyatakan bahawa makanan tersebut tidak mengandungi pemanis tanpa zat siklamat. Oleh yang demikian kamu telah melakukan kesalahan di bawah s 16 Akta Makanan 1983.

The appellant pleaded not guilty to the charges.

In the present case the appellant was charged under s 13(l)(e) of the Food Act 1983, which upon conviction, he is liable to be sentenced to imprisonment for a term of not exceeding five years. It is clear therefore that this is a seizable offence, and that a sanction or authorization to prosecute the case is mandatory. This is not disputed.

The law

It is clear that under art 145(3) of the Federal Constitution the public prosecutor (ie the Federal Attorney General) is vested with the power to institute, conduct or discontinue any criminal proceedings. There is a number of authorities on this point: *Repco Holdings Bhd v PP* [1997] 3 MLJ 681 (CA); *PP v Lee Ming & Anor* [1998] 4 MLJ 113; and *PP v Jamil Jilap & Ors* [2000] 5 MLJ 311.

A prosecuting officer may, under a particular law, institute a criminal proceeding but he must be authorized by the public prosecutor. Such an authorization or sanction to prosecute is required for each offence, and it must be tendered into the court before the trial begins. Without an authorization from the public prosecutor, it ultra vires the law and the proceeding would be a nullity.

In the Court of Appeal case of *Sjn Thomas a/l Manivello v Lt Kol Din Yati bin Dahlan & Ors* [1998] 3 MLJ 329, Shaik Daud JCA said (at p 333):

> Therefore, from these decided cases, I (we) can come to the conclusion that a trial begins when the charge is read to the accused person and his plea taken but it only commences at the trial proper, when the prosecution calls its first witness.

In this case the trial began on 10 November 1998 (see p 1 appeal record) when the charges were read to the appellant and his plea taken, there was no indication of the source of the prosecuting officer's authority to institute the criminal proceeding. It is clear therefore that the proceeding was a nullity.

The learned deputy public prosecutor argued that as a matter of fact an authorization letter dated 11 April 1998 was issued (p 6 appeal record), but it was not produced in court when the trial began; it was produced later in the proceeding. Learned deputy public prosecutor explained that the learned magistrate had been accustomed to the fact that the same prosecuting officer (Gilbert Khoo) had in the past been dealing with cases of similar nature, and he was always armed with an authorization letter. Further, he urged the court to invoke s 114(e) of the Evidence Act 1950,

and the court should take judicial notice of the practice of the court (ie the magistrate court) and presume that the authorization had been given to the prosecuting officer. Moreover the appellant had not asked for the authorization letter when the trial began, added the learned deputy public prosecutor with the tongue in cheek manner. The appellant was unrepresented when the trial began.

The presumption under s 114(e) 'that judicial and official acts have been regularly performed' has no application here. The court cannot take judicial notice of a practice that is unknown to the law, and more importantly, such a practice by the particular court, is in breach of the rule or law. It seems that the law is honoured more in the breach than its observance.

The prosecution averred that an authorization letter dated 11 April 1998 was issued to the prosecuting officer prior to the proceedings. That is to say, the authorization had been issued prior to the trial which began on 10 November 1998. According to the notes of proceedings for 10 November 1998 1 March 1999, 14 June 1999 and 9 September 1999 (pp 1–5 appeal record) the learned magistrate had not made any record of this authorization letter dated 11 April 1998. However, he mentioned of two authorization viz, one written on 1 April, 1998 (at p 7 appeal record) and the other impliedly, on 1 August 1998 (at p 8 appeal record) which gave the prosecuting officer the locus standi. He seemed confused. Much confusion in the magistrate's mind could have been avoided if the said authorization letter dated 11 April 1998 was shown to him or tendered into court on 10 November 1998 when the trial began. In the Notes of Proceedings there is nothing on record to show that the said authorization letter was tendered in court when the trial began.

The requirement of the law is clear that such an authorization must be produced when the trial begins so as to confer jurisdiction on the court. See *Ng Chuan & Anor v Rex* [1948] MLJ 185 where Murray-Anysley CJ said:

> Where a sanction is required to prosecute, the lack of it deprives the court of jurisdiction. This cannot be cured unless there is statutory provision to that effect.

In *Hassan bin Isahak v PP* [1948–49] MLJ Supp 179, Pretheroe Ag CJ on behalf of the Court of Appeal, held that in the absence of the sanction of the public prosecutor the proceedings in the district court on 24 July 1947 were null and void and consequently the appellant was never in peril on that day.

In *Lyn Hong Yap v PP* [1956] MLJ 226, Thomson J (as he then was) referred to this judgment in *Chong Tuck Loong v PP*, Perak Criminal Appeal No 73/1952 (unreported) where he made the following observations at p 228:

> ... if that section (s 12) is not complied with the Court has no jurisdiction to try offences under the Ordinance, and I do not think it can be said to be complied with unless it is clear either on the face of the proceedings or as a matter of reasonable inference that the public prosecutor (or, by reason of s 376 of the Criminal Procedure Code, the Solicitor-General or a duly appointed peputy public prosecutor) has either taken an active part in the

> prosecution or has consented to the charges brought against the accused after applying his mind at the lowest to the facta probanda forming the material of these charges.

On appeal, Mathew CJ speaking on behalf of the Court of Appeal said at p 228:

> We are in complete agreement with the very full and clear grounds of judgment delivered by Thomson J, and there is nothing that we can profitably add to what has been said therein.

Learned deputy public prosecutor made an unusual move, by making an application to court for a short adjournment to enable him to subpoena the trial magistrate to give evidence in court that the authorization letter was shown to him before the commencement of the trial. This application is unprecedented. It is most irregular, firstly, the court record cannot be rectified by a parol evidence introduced at the appellate stage. Secondly, the prosecution's allegation that the magistrate had seen the authorization letter before the trial belies his earlier assertion that the authorization letter was introduced later on in the proceedings (see above).

In my judgment it is clear that no authorization letter was produced or tendered in court when the trial began. There is no room for presumption when it comes to the interpretation of a statute. The practice adopted by the learned magistrate was ultra vires the law. Without this authorization, the court lacks jurisdiction to hear the case. This defect cannot be cured.

In the circumstances, the court holds that the appeal must be allowed. The appellant is discharged not amounting to an acquittal.

Appeal allowed.

Reported by Wong Siok Chin